UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA, Plaintiff,

v. Criminal Action No. 3:18-cr-142-DJH

DARREN RENDER, Defendant.

* * * * *

ORDER

On June 11, 2018, a Louisville Metro Police Department detective on patrol recognized Defendant Darren Render walking down the street. The LMPD detective believed that Render was subject to state-court ordered home incarceration. The detective and his partners then approached Render to speak with him, but Render attempted to evade the officers. In the ensuing scuffle, a handgun fell from his pants. Render is charged with unlawfully possessing a firearm as a convicted felon. He moves the Court to suppress the evidence obtained as a result of the June 11 stop. (Docket No. 22) After a hearing on the motion to suppress on September 9, 2019 (D.N. 26), the parties submitted post-hearing briefs. (D.N. 30; D.N. 31) For the reasons stated below, the Court will deny the motion.

I.

Detective Jonathan Haywood of LMPD's Ninth Mobile Division was on patrol with his partners on the afternoon of June 11, 2018, when he noticed Darren Render near the intersection of 7th Street and Berry Boulevard. (D.N. 27, PageID # 51) Haywood recognized Render from two previous interactions: in 2015, Haywood participated in Render's arrest for possession of a stolen firearm; he also accompanied Kentucky's probation office on a Home Incarceration Program (HIP) check-in visit at Render's home some months prior to the June 11 stop. (*Id.*) Haywood testified that when he saw Render, he thought it was strange that Render was walking

up and down the street because Haywood believed Render was still on HIP status, although he did not see a monitoring device on Render's ankle. (*Id.*, PageID # 52–53) Haywood testified that Render was wearing a full set of jogging gear on a June day and was patting down his clothes in an "odd" fashion. (*Id.*, PageID # 53) Haywood also thought it was "peculiar" that Render had his hood up over his face on such a hot day. (*Id.*) After informing his colleagues of his suspicions, Haywood turned the unmarked police car around and parked at a gas station near the Boost Mobile store Render had just entered. (*Id.*) Haywood testified that this intersection was an area "known for a lot of crime, drugs, different things . . . and I'm like, there's no real good reason in my mind why he's over here walking around back and forth up and down the street." (*Id.*, PageID # 53)

The officers followed Render to "stop and talk to him to see what's going on," and met Render near the open door of the Boost Mobile store as he was leaving. (*Id.*; *see also* Defendant's Exhibit 4, Boost Mobile surveillance footage, at 00:20) Haywood testified that when he and his partners met Render at the front door of the store, he said "How you doing, Darren? . . . Man, step outside, [l]et me talk to you for a second." (D.N. 27, PageID # 54) Once he stepped through the open door, Render attempted to push past the officers and "flee on foot." (*Id.*; *see also* Defendant's Exhibit 4, 00:24–00:26) A brief scuffle ensued. (Defendant's Exhibit 4, at 00:26–00:29) During the brief struggle, a handgun fell from Render's pocket; the officers seized it, conducted a pat-down search of Render, and discovered an electronic monitoring device on his ankle. (D.N. 27, PageID # 27–28; *see also* Government's Exhibit 2, photo of electronic monitoring device)

The events leading up to Render's arrest were not recorded on bodycam footage. Curiously, Haywood testified that the Ninth Mobile is tasked with joint federal operations and therefore LMPD does not require Ninth Mobile officers to record interactions with suspects of ongoing investigations. (D.N. 27, PageID # 60–61) The United States offered no additional

testimony or evidence to support this assertion. But the government obtained surveillance footage from the Boost Mobile store that depicts some of the interaction at issue in this case; it shows Render entering the store and shaking the hand of the counter attendant before turning to leave the store through the propped-open front door. It shows him attempting to run away from the three officers standing outside, and the officers struggling to restrain him. (Defendant's Exhibit 4, at 00:00–00:38)

Render has moved to suppress the gun recovered by the officers, arguing that there was not reasonable suspicion to support the initial investigatory stop outside the Boost Mobile store. (D.N. 22) The Court concludes that while the officers had sufficient reasonable suspicion to detain Render as soon as they approached him—based upon Render's odd behavior, peculiar dress, and Haywood's knowledge that Render was likely restricted by HIP—no reasonable suspicion was required for the initial approach merely to speak with Render. Once Render decided to flee, however, reasonable suspicion was firmly established and a *Terry* stop authorized. When the gun fell from Render's pants, probable cause was established to justify Render's arrest.

II.

The Fourth Amendment allows a limited range of interactions between police and citizens: "consensual encounters in which contact is initiated by a police officer without any articulable reason whatsoever and the citizen is briefly asked some questions; a temporary involuntary detention or *Terry* stop which must be predicated upon 'reasonable suspicion'; and arrests which must be based on probable cause." *United States v. Carr*, 355 F. App'x 943, 945 (6th Cir. 2009) (citing *United States v. Bueno*, 21 F.3d 120, 123 (6th Cir. 1994)); *see Terry v. Ohio*, 392 U.S. 1 (1968). An interaction between a citizen and law enforcement where "a police officer approaches an individual and asks a few questions . . . will not trigger Fourth Amendment scrutiny unless it

loses its consensual nature," and the interaction is consensual as long as "a reasonable person would feel free 'to disregard the police and go about his business.'" *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (quoting *California v. Hodari D.*, 499 U.S. 621, 628 (1991)). "Officers do not seize people 'merely by approaching individuals on the street or in other public places and putting questions to them.'" *Unites States v. Williams*, 615 F.3d 657, 663 (6th Cir. 2010) (quoting *United States v. Drayton*, 536 U.S. 194, 200 (2002)). Consensual encounters can provide evidence that establishes reasonable suspicion, allowing the interaction to ripen into an investigatory *Terry* stop. *See Mitchell v. United States*, 233 F. App'x 547, 550–51 (6th Cir. 2007) (finding that the initial encounter was consensual but transitioned to a seizure when officers frisked defendant; "[h]owever, at this juncture, the officers had specific and articulable facts which gave rise to reasonable suspicion."); *United States v. Waldon*, 206 F.3d 597, 603–04 (6th Cir. 2000) (holding that officer's observation of defendant's dye-stained fingers via consensual encounter created reasonable suspicion of burglary to transition interaction into *Terry* stop).

A.

The interaction between Render and the officers proceeded in four stages: the officers walked up to Render in front of the Boost Mobile store; Render ignored the officer's request to talk and immediately attempted to flee; the officers attempted to detain Render; and Render's ultimate arrest, which followed the scuffle that revealed the firearm. At both the evidentiary hearing and in the briefing on the motion to suppress the parties focused solely on whether reasonable suspicion permitted the detention. But as explained below, the Court first concludes that the initial encounter between Render and LMPD officers outside the Boost Mobile store did not rise to the level of a *Terry* stop.

Haywood saw Render walking back and forth down a busy street, in a "peculiar" manner, dressed to conceal, despite the heat, and curiously patting down his pockets. (D.N. 27, PageID # 53) This was behavior Haywood described as "all the way odd." (*Id.*) Haywood knew from previous experience that Render likely remained on HIP and that individuals placed on HIP are only permitted to travel to and from approved locations, such as a place of employment or to retrieve a dependent from childcare. (*See id.*) In this case, therefore, merely seeing Render on the street prompted Haywood to attempt a consensual encounter with him. The detective sought to determine whether Render was engaged in criminal activity. Specifically, Haywood wanted to determine whether Render was in violation of the terms of the home incarceration program.[1] *See* Ky. Rev. Stat. § 532.220 (stating conditions of home incarceration and that violation of those terms constitutes an escape under Ky. Rev. Stat. § 520.030, punishable as a Class D felony); *see also United States v. Garrett*, 106 F. App'x 423, 427 (6th Cir. 2004) ("Police officers may initiate consensual encounters even when they suspect the civilian of wrongdoing but cannot yet articulate a reasonable suspicion as to why."). At this point in the interaction, considering the totality of the circumstances detailed above, Haywood could have briefly detained Render to investigate whether he was violating the terms of his HIP restrictions. *See United States v. Young*, 707 F.3d 598, 604 (6th Cir. 2012) (finding reasonable suspicion when officers observed defendant and suspected that

[1] Detective Haywood provided imprecise testimony on both his knowledge of HIP and Render's specific HIP status. (*See* D.N. 27, PageID # 79) He was unaware that HIP could be ordered as a condition of bond. (*Id.*) He was also unaware of Render's specific status; Render had in fact been released from state custody on bond and confined to his home pending an upcoming court date, according to defense counsel. (*Id.*, PageID # 90) But this misunderstanding of the reason Render was subject to the HIP does not change the fact that Haywood remembered Render and recalled—correctly—that Render was restricted by court-ordered home incarceration. (*Id.*, PageID # 53) And the Kentucky law regarding escape, Ky. Rev. Stat. § 520.030, applies to individuals released to HIP on the same terms as Render. *Weaver v. Commonwealth*, 156 S.W.3d 270 (holding that the crime of escape applied to defendant who was released to HIP as condition of pretrial release).

he was trespassing); *see also Terry*, 392 U.S. 1 (holding that reasonable suspicion can justify an investigatory stop). But Haywood approached Render in an attempt to engage him in a voluntary conversation about what he was doing on the street.

Fourth Amendment protections would only apply to this initial encounter between Render and the police officers if the interaction amounted to a seizure. *See Bostick*, 501 U.S. at 434. The question is whether the LMPD officer's actions here were "coercive"; if "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter," no seizure occurred. *Id*. at 436. The Sixth Circuit considers the following factors as evidence of a seizure: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Campbell*, 486 F.3d at 954 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

In light of the facts presented here, the officers' actions during the brief encounter with Render immediately before his attempted flight did not amount to a seizure. Detective Haywood and his partners approached Render in front of a public storefront. (Defendant's Exhibit 4, at 00:20) They did not brandish weapons or display overt signs of authority, such as uniforms or police lights. (*Id*.) The undisputed testimony establishes that Haywood said to Render, "[h]ow you doing, Darren? . . . Man, step outside, [l]et me talk to you for a second." (D.N. 27, PageID # 54) Haywood did not ask Render to provide identification, order him to stop, or convey that Render was not free to leave. *See United States v. Hinojosa*, 534 F. App'x 468, 470 (6th Cir. 2013) ("Police officers 'may approach individuals and propose initial questions without having any reasonable suspicion of criminal activity, if the police do nothing to convey to [the individual] that he is not free to leave.'") (quoting *United States v. Peters*, 194 F.3d 692, 698 (6th Cir. 1999)).

Render did not yield to Haywood's request to talk. He responded, instead, by immediately attempting to flee. (Defendant's Exhibit 4, 00:24–00:26) The surveillance footage from the Boost Mobile store indicates that the officers did not physically contact Render in any way before Render attempted to run. (Defendant's Exhibit 4, at 00:24–00:26) And, the officers did not corner Render. (*Id.*); *see United States v. Carr*, 674 F.3d 570, 573 (6th Cir. 2012). These facts do not equal a "seizure."

At this early stage, the interaction amounted to a mere consensual encounter and was therefore not subject to the strictures of the Fourth Amendment. *See United States v. Falls*, 533 F. App'x 505, 506 (6th Cir. 2013) (finding officer's approach on foot and questioning of defendant constituted consensual encounter); *Waldon*, 206 F.3d at 603–04 (finding that officer's approach and initial questioning of defendant amounted to consensual encounter). The officers had reasonable suspicion to detain Render—based on his odd clothing, peculiar behavior, and Haywood's belief that Render was still subject to HIP restrictions—as soon as they approached him on the street. But instead of immediately conducting a *Terry* stop, the officers attempted to approach Render for a voluntary conversation, an encounter that did not require reasonable suspicion. It was only after Render attempted to flee, elevating the situation, that the officers detained him and subsequently discovered the gun.

B.

After the brief initial encounter between Render and the LMPD officers outside the Boost Mobile store, Render tried to flee and thus changed the previously consensual nature of the interaction. This "unprovoked '[h]eadlong flight' upon noticing the police 'is the consummate act of evasion,'" and can provide reasonable suspicion to conduct a *Terry* stop. *United States v. Johnson*, 620 F.3d 685, 694 (6th Cir. 2010) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 124

(2000)). Here, Render's attempted flight, in combination with Haywood's prior observations of Render—pacing the street in a full jogging suit on a hot day and oddly patting down his pockets—and Haywood's belief that Render was still subject to the strictures of HIP "provides the inference of suspicious behavior that justifies a *Terry* stop under *Wardlow*." *United States v. Jeter*, 721 F.3d 746, 755 (6th Cir. 2013) (citing *Wardlow*, 528 U.S. at 124–26). And although there are innocent reasons to flee, "*Terry* permits 'officers [to] detain the individuals to resolve the ambiguity.'" *Id.*; *see also United States v. Carter*, 558 F. App'x 606, 611 (6th Cir. 2014) (upholding district court's finding that reasonable suspicion was established when defendant acted nervously, avoided officer's questions, and attempted to flee).

Render's flight provided the obvious and final act of suspicious behavior that provided Haywood with reasonable suspicion to detain Render. *See id.* As the officers tried to detain Render so that they could perform a *Terry* stop, Render resisted, and in the subsequent tussle the handgun fell to the pavement. (D.N. 27, PageID # 27–28) The presence of the gun then gave the officers probable cause to arrest Render. Because the handgun fell as the officers attempted to detain Render—a detention supported by reasonable suspicion—the Court finds no Fourth Amendment violation.

C.

The cases Render cites in support of his motion fail to address the factual scenario before the Court. In *United States v. Beauchamp*, the Sixth Circuit held that the officers' detention of the defendant was not supported by reasonable suspicion because the only facts apparent to the officers *before* they effectuated the stop were that the defendant walked away from the police and avoided eye contact with one officer. 659 F.3d 560 (6th Cir. 2011). Although the officers eventually recognized Beauchamp from a previous encounter and noticed his nervousness and evasive

responses to questioning, these facts did not become apparent to them until after the initial detention, and "reasonable suspicion to make a stop cannot be justified by facts that become apparent only after a seizure." *Id.* at 571. In contrast, Detective Haywood recognized Render instantly—and thought that Render was on HIP and thus violating the law simply by being outside of his home—prior to the stop. His observations regarding Render's clothing and odd behavior—pacing without a clear destination—strongly suggested that Render was not heading directly to or from one of the approved variances from HIP, such as work or a doctor's appointment. (*See* D.N. 27, PageID # 53 ("I'm like, there's no real good reason in my mind why he's over here walking around back and forth up and down the street.")) Thus, after the brief initial encounter, when Render attempted to flee, Haywood had reasonable suspicion to detain Render. This reasonable suspicion attached even before Haywood confirmed that Render was wearing an ankle monitor or saw the gun that fell from Render's pants. (*See* Government's Exhibit 2)

Render contends that Haywood could not have reasonably suspected him of drug activity because Render was alone on a busy street during normal hours when Haywood recognized him. (D.N. 30, PageID # 109) But unlike *Beauchamp*, where the officers unsuccessfully asserted reasonable suspicion of narcotics activity, here Haywood reasonably suspected not that Render was dealing drugs, but rather that he was breaking the terms of his home incarceration obligations, in violation of state law. Ky. Rev. Stat. § 532.220.

Render also cites *United States v. Payne* for the proposition that "a person's criminal record alone does not justify a search." 181 F.3d 781, 790–91 (6th Cir. 1999). (D.N. 30, PageID # 110) But *Payne* is likewise distinguishable. The officer in *Payne* did not personally witness activity by the defendant that was itself potentially criminal. Instead, the officer attempted to establish reasonable suspicion by combining his knowledge of the defendant's criminal history with a vague

tip. 181 F.3d at 790–91. In contrast, Detective Haywood believed that Render was on HIP because of his personal experience visiting Render's home with the Kentucky probation office months prior to the stop at issue.[2] Render's seemingly aimless presence on the street, combined with his subsequent attempt to flee from the officers, provided Haywood with reasonable suspicion that Render was violating the terms of his home incarceration.

Render also contends that Haywood's knowledge that he was on HIP was outdated and stale, and thus could not justify his detention. (D.N. 30, PageID # 112–13) Render again cites *Payne*, where the Sixth Circuit found that since "[d]rugs are not the types of objects that are likely to be kept," it follows that an unreliable tip that the defendant had possessed large amounts of methamphetamine six weeks prior to the search at issue "was stale by the time of the search [because] . . . the tip contained no indication of ongoing activity." 181 F.3d at 790. But in *Payne*, the suspected criminal activity was narcotics trafficking. The age of the tip rendered it unreliable because it was unlikely that evidence of drug trafficking would still be found at the given address weeks later. *Id*.; *see United States v. Akram*, 165 F.3d 452, 456 (6th Cir. 1999) (holding that the staleness inquiry depends on "the inherent nature of the suspected crime and the objects sought"). In contrast, here the suspected criminal activity—violation of the terms of HIP—is not inherently fleeting, and therefore staleness is less of a concern. As the government points out, Haywood "understood that individuals could be on HIP for periods of 30 days or periods of two to three years." (D.N. 31, PageID # 118) Haywood knew that Render was on HIP months prior to the encounter outside the Boost Mobile store and reasonably believed that Render was likely still on

[2] Haywood's testimony on this point was imprecise. On direct examination he agreed that the HIP home visit he paid to Render's residence was "a couple of months" prior to the date of the stop at issue here; on cross examination, however, he conceded that the visit was "[p]ossibly" as long as five months prior to the stop. (D.N. 27, PageID # 77) Nevertheless, Detective Haywood recalled the visit and that Render was subject to the restrictions of HIP.

HIP as of June 11, 2018. Haywood thus suspected that Render was engaging in criminal activity by violating the terms of his ongoing HIP. This information was not stale because HIP can last for up to several years. *See United States v. Hython*, 443 F.3d 480, 485 (6th Cir. 2006) (finding that as to the staleness inquiry "[t]he passage of time becomes less significant when the crime at issue is ongoing or continuous . . ."); *Akram*, 165 at 456.

III.

The officers' initial approach amounted to an attempt at a consensual encounter between a citizen and the police. The Court concludes that Haywood had reasonable suspicion to detain Render—based on his odd dress, peculiar behavior, and Haywood's knowledge that Render probably remained subject to HIP—but Haywood chose first to attempt a voluntary conversation with Render. Once Render decided to run, the reasonable suspicion of criminal behavior necessary for a *Terry* stop was firmly established. While attempting that stop, the handgun fell from Render's pants, providing probable cause for Render's arrest. The LMPD officers did not violate Render's Fourth Amendment rights, and the gun obtained as a result of the stop need not be suppressed. Accordingly, and the Court being otherwise sufficiently advised, it is hereby

ORDERED that Render's motion to suppress evidence collected from the June 11 stop (D.N. 22) is **DENIED**. A telephonic status conference will be set by subsequent order.

November 27, 2019

David J. Hale, Judge
United States District Court